Supreme Court, U.S.
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No. 92-1516

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

MAGNESIUM ELEKTRON, INC.,

Petitioner,

v.

PUBLIC INTEREST RESEARCH GROUP
OF NEW JERSEY, INC. and
FRIENDS OF THE EARTH,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
1705 N Street, NW
Washington, DC 20036
(202) 857-0240

Date: April 14, 1993

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MOTION FOR LEAVE TO FILE BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of the Petition for a Writ of Certiorari. Counsel for Petitioner has consented to the filing of this brief. Counsel for Respondents has declined to grant her consent to the filing. Accordingly, this motion is necessary.

WLF is a nonprofit public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes

a substantial portion of its resources to advancing the interests of the free-enterprise system. In particular, WLF is interested in promoting the certainty, predictability, and financial stability of business interests. WLF believes that these indicia of a properly operating free-enterprise system are threatened by undue judicial interference with the actions of the elected branches of government. To that end, WLF has appeared on numerous occasions as *amicus curiae* before this Court as well as other federal and state courts, asserting the necessity for strict adherence by the federal courts to the principle of separation of powers. *See, e.g., Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990); *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992).

WLF is concerned that the decision below is yet another effort by the lower federal courts to usurp the authority of the executive branch of government. The federal courts exceed their authority when they reach out to decide cases brought by plaintiffs who have suffered no real injury -- but who wish to second-guess the executive branch's enforcement of federal law.

WLF believes that its brief may be of assistance to the Court in deciding the issues raised in this Petition. WLF brings to this case a perspective that differs from that of any of the parties. It has no financial and/or administrative stake in the outcome of this action; it is filing solely out of a desire to assist the Court in arriving at a proper resolution of the issues raised.

For all the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
1705 N Street, NW
Washington, DC 20036
(202) 857-0240

Counsel for *amicus*

April 14, 1993

QUESTION PRESENTED

Whether a plaintiff suing under the "citizen suit" provision of the Clean Water Act adequately demonstrates standing to sue an entity that violates a Clean Water Act discharge permit, where the plaintiff demonstrates that the violation "contributes" to the "kind of injuries" alleged by the plaintiff but does not demonstrate that the violation actually injured him.

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INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation are set out fully in the motion for leave to file accompanying this brief.

STATEMENT OF THE CASE

In the interest of judicial economy, WLF hereby adopts by reference the Statement of the Case contained in the Petition for Writ of Certiorari.

In brief, Petitioner Magnesium Elektron, Inc. ("MEI") operates an industrial plant in Flemington, New Jersey that produces zirconium compounds used in various applications, including antiperspirants. The plant's principal waste product is a nontoxic, salt-water effluent, similar to natural sea water.

MEI holds a permit, issued pursuant to the Federal Water Pollution Control Act (the "Clean Water Act"), 33 U.S.C. §§ 1251 *et seq.*, that authorizes MEI to discharge limited amounts of its salt-water effluent into the nearby Wickecheoke Creek. The water from the creek ultimately flows into the Delaware and Raritan Canal (the "Canal") and the Delaware River.

MEI's discharge permit requires MEI to monitor its discharges and to report its findings on a monthly basis to the New Jersey Department of Environmental Protection ("NJDEP"). MEI has stipulated that, on various occasions between 1984 and 1989, its effluent discharges exceeded limitations imposed under its discharge permit. On each such occasion, MEI voluntarily reported its permit violations to NJDEP.

Respondents Public Interest Research Group of New Jersey, Inc. ("PIRG") and Friends of the Earth ("FOE") are non-profit organizations that, among other things, seek to ensure that companies issued Clean Water Act discharge permits strictly comply with permit requirements. After reading the MEI reports to NJDEP -- in which MEI admitted various minor violations of permit requirements -- Respondents filed suit against MEI in federal district court based on those violations. Respondents invoked the "citizen suit" provision of the Clean Water Act, 33 U.S.C. § 1365, which permits "any citizen" to file a civil action on its own behalf against "any person" alleged to be in violation of: (1) a Clean Water Act effluent standard or limitation; or (2) an order issued by a state or the federal government with respect to such standard or limitation.

Respondents' suit also alleged that MEI violated its discharge permit by failing to conduct all required monitoring and to submit all required reports.

Respondents alleged that several of their members had been injured by MEI's permit violations. Those members contended, *inter alia*, that they avoid drinking water and eating fish from the Canal because they fear ill-effects on their health from "contaminants" discharged into the Canal; that their enjoyment of the recreational benefits of the Canal is reduced by their knowledge that the Canal contains "pollutants"; that the discharge of pollutants into the Canal threatens aquatic life; and that their right to take action to prevent violations of the Clean Water Act was diminished by MEI's failure to comply with all monitoring and reporting requirements. *See* Petition Appendix ("Pet. App.") A35-A47.

On February 28, 1992, the district court granted partial summary judgment to Respondents on the issue of liability and issued a permanent injunction against further effluent discharges by MEI into the Wickecheoke Creek. Pet. App. A30-A31. The district court also granted Respondents' motion for a declaration that they had standing to file their action. *Id.* In granting that motion, the court denied MEI's request for an evidentiary hearing on the question of standing.

In determining that Respondents had standing to sue, the district court applied the test for standing in Clean Water Act cases adopted by the United States Court of Appeals for the Third Circuit in *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991). *See* Pet. App. A13. Under *Powell Duffryn*, a plaintiff can establish (for standing purposes) that his injury is "fairly traceable" to a Clean Water Act violation by demonstrating that a defendant has:

> (1) discharged some pollutant in concentrations greater than allowed by its permit

(2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that

(3) this pollutant causes or contributes to the kind of injuries alleged by the plaintiffs.

Powell Duffryn, 913 F.2d at 72.

Relying on *Powell Duffryn*, the district court found that Respondents had standing to sue because they had suffered cognizable injuries that were "fairly traceable" to MEI's permit violations and that were "likely to be redressed by a favorable decision." Pet. App. A8-A15. The district court went on to grant summary judgment to Respondents on the issue of liability and to issue a permanent injunction against continued effluent discharges. Pet. App. A17-A29.[1]

MEI appealed the district court's February 28, 1992 judgment to the Third Circuit, which affirmed the judgment (apparently relying on *Powell Duffryn*) in a two-sentence order issued December 15, 1992. Pet. App. A1-A2. After the Third Circuit denied rehearing on January 8, 1993 (Pet. App. A32-A33), MEI timely filed its Petition for Certiorari.

REASONS FOR GRANTING THE PETITION

This case raises an issue that has arisen with increasing frequency in recent years -- who has standing to sue Clean Water Act permit holders found to be in

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[1] Although MEI holds a permit that expressly authorizes it to discharge effluent into Wickecheoke Creek, the district court apparently felt that to permit continued discharges would create too great a risk that MEI would again violate discharge limitations. Pet. App. A27-A28. As a result, MEI now hauls its effluent to the Trenton Sewer Authority, which treats the effluent and then discharges it into the Delaware River at a point *upstream* from the Wickecheoke Creek.

violation of their permits? The eagerness with which plaintiffs bring "citizen suits" against permit holders who admit violations is easily explainable: a pot of gold (in the form of attorney fees awardable under 33 U.S.C. § 1365(d)) awaits anyone who substantially prevails in a citizen suit brought to enforce the Clean Water Act.

Almost inevitably, success in such citizen suits turns on whether the plaintiff can establish standing to sue, because a permit holder who has already admitted a permit violation -- in required monitoring reports filed with government authorities -- will usually have few other bases for contesting liability.

Given the frequency with which the standing issue arises and the enormous potential liability faced by permit holders in such Clean Water Act cases, the issue of who has standing to enforce the Clean Water Act is of tremendous importance to the business community.

Moreover, the standard adopted by the Third Circuit for deciding standing issues in Clean Water Act cases (a standard that has now been adopted by at least two other circuits) is in direct conflict with recent decisions of this Court. Guidance from the Court is urgently needed to correct the Third Circuit's erroneous understanding of standing doctrine, before the entire Clean Water Act enforcement mechanism is thrown into disarray.

I. THE ISSUE OF HOW COMPLIANCE WITH CLEAN WATER ACT PERMIT REQUIREMENTS IS TO BE ASSURED IS A MATTER OF NATIONAL IMPORTANCE THAT SHOULD BE RESOLVED BY THIS COURT

The Clean Water Act, adopted by Congress in 1972, has had a significant impact on virtually every industrial enterprise in this country. The Act prohibits the discharge of any "pollutant" (defined broadly to include virtually any substance other than pure water) into virtually any waterway, except pursuant to a government-issued

discharge permit. 33 U.S.C. § 1311. As a result of that requirement, businesses have been required to obtain literally hundreds of thousands of discharge permits in order to continue even those discharges with minimal effect on water quality. Those permits, which place strict limits on total discharges, in turn require businesses to monitor their discharges and report their findings to state and/or federal authorities.

The Clean Water Act provides stringent enforcement mechanisms. The U.S. Environmental Protection Agency ("EPA"), as well as state officials, are authorized to seek injunctive relief against permit violators and to assess civil penalties. 33 U.S.C. § 1319. Violators are also subject to severe criminal penalties. 33 U.S.C. § 1319(c).

Congress also provided for enforcement by means of "citizen suits" brought by anyone injured by a permit violation (33 U.S.C. § 1365), and -- to induce injured private citizens to file suit -- provided for attorney fee awards to prevailing plaintiffs. 33 U.S.C. § 1365(d). But, as this case well illustrates, unless some reasonable limitation is placed on who qualifies as an "injured" citizen entitled to sue under the "citizen suit" provision, the financial burden on Clean Water Act permit holders will be far more onerous than anything contemplated by Congress.[2]

The nature of the Clean Water Act permitting system eliminates from "citizen suits" most of the costs and risks that normally are faced by citizens contemplating a lawsuit. Since permit holders must monitor and report their discharges to state and/or federal authorities, citizens monitoring such reports can quickly determine when a permit violation has occurred simply by comparing the

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[2] In light of the threat of federal government civil and criminal enforcement actions faced by all permit holders, there is little danger that tightening the Third Circuit's "citizen suit" standing requirements would result in increased violations of discharge limitations imposed Clean Water Act permits.

reports to the terms of the permit. Permit holders are in no position to deny such evidence of violations, since it is their own reports that demonstrate the violations.

Groups such as Respondents have made a cottage industry out of monitoring reports filed by Clean Water Act permit holders and then bringing "citizen suits" against permit holders admitting to violations -- even when (as here) the violations cannot be termed anything other than "technical" violations. Indeed, Respondent PIRG was the plaintiff in *Powell Duffryn*. In New Jersey alone, other recent PIRG "citizen suits" following that same pattern (and which were not settled prior to a reported decision) include *Public Interest Research Group v. Yates Industries*, 757 F. Supp. 438 (D.N.J. 1991); *Public Interest Research Group of New Jersey v. Witt Chemical Corp.*, C.A. No. 89-3146, 1990 WL 66178 (D.N.J. 1990); *Public Interest Research Group v. GAF Corp.*, C.A. No. 89-2283 (D.N.J. 1990); *Public Interest Research Group of New Jersey v. U.S. Metals Refining Co.*, 681 F. Supp. 237 (D.N.J. 1987); *Student Public Interest Research Group of New Jersey v. AT&T Bell Laboratories*, 617 F. Supp. 1190 (D.N.J. 1985); *Student Public Interest Research Group v. Georgia Pacific Corp.*, 615 F. Supp. 1419 (D.N.J. 1985); *Student Public Interest Research Group of New Jersey v. Tenneco Polymers*, 602 F. Supp. 1394 (D.N.J. 1985); and *Student Public Interest Research Group of New Jersey v. Fritzsche, Dodge & Olcott*, 579 F. Supp. 1528 (D.N.J. 1984), *aff'd*, 759 F.2d 1131 (3d Cir. 1985). Given the lucrative nature of such suits (in terms of the potential for significant attorney fee awards versus the minimal costs of proving a permit violation), PIRG and others can be expected to continue to bring a large number of such suits to the federal courts in the years to come. The financial impact of these suits on Clean Water Act permit holders cannot be overstated.

The key issue in virtually all of the cases cited above was whether the plaintiff had standing to sue. The Third Circuit has established extremely liberal standing requirements for such cases. In contrast, this Court's

recent decisions regarding standing in environmental cases suggest that establishing standing in such cases is not nearly so easy as the Third Circuit has indicated. *See* Section II, *infra*. In light of the recurring nature of the standing issues presented by this case, the Court should grant review in order to clarify the law in this area.

II. THE THIRD'S CIRCUIT'S STANDING REQUIREMENTS SERIOUSLY MISREAD THIS COURT'S TEACHINGS IN *LUJAN I* AND *II*

This Court had occasion in *Lujan v. Defenders of Wildlife [Lujan II]*, 112 S. Ct. 2130 (1992); and *Lujan v. National Wildlife Federation [Lujan I]*, 110 S. Ct. 3177 (1990), to revisit the circumstances under which a plaintiff is said to have "standing" to litigate alleged violations of federal law in the federal courts. The Court noted in *Lujan II* that Article III of the Constitution limits the jurisdiction of the federal courts to "Cases" and Controversies" and that the doctrine of "standing" has developed as a method of ensuring that federal courts do not ignore that limitation. *Lujan II* at 2136. The Court explained that the "irreducible constitutional minimum of standing" contains three elements:

> First, the plaintiff must have suffered "injury in fact" -- an invasion of a legally-protected interest which is (a) concrete and particularized; and (b) actual and imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. (internal quotations and citations omitted).

The Court made clear that the doctrine of standing is grounded in separation-of-powers concerns, concerns that the federal courts not arrogate to themselves powers that properly belong in the political branches of government. *Id.* at 2144-2145. Moreover, federal courts are not justified in ignoring Article III constraints simply because they may have been invited to do so by Congress. *Id.* Thus, the Court held that Congress's insertion of a "citizen suit" provision in the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. §§ 1530 *et seq.*, did not in any way lessen the burden on a citizen bringing suit to enforce the ESA, to demonstrate that he met traditional standing requirements. *Id.* at 2145.

Moreover, the Court made clear that the requirements that the alleged injury be "particularized" and "actual," and be "fairly traceable" to the challenged action mandate that the plaintiff make a "factual showing of perceptible harm." *Id.* at 2139. Standing, the Court emphasized, is not "an ingenious academic exercise in the conceivable." *Id.*, quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). Thus, the Court said, a plaintiff has not suffered a legally cognizable injury where his alleged injury is based on "pure speculation." *Id.* at 2140.

The Court in *Lujan I* made clear that where a plaintiff fails to introduce sufficient facts to demonstrate his/her standing, it is improper for a federal court to "presume" the missing facts necessary to establish the injury that the plaintiff generally alleges. *Lujan I*, 110 S. Ct. at 3177. The Court noted that while generalized allegations of injury may be sufficient to withstand a Rule 12(b)(6) motion to dismiss for failure to state a claim, those generalized allegations must be supported by specific facts if the plaintiff is to continue through later stages of the litigation. *Id.* And if the case proceeds to trial, the plaintiff must demonstrate by a preponderance of the evidence the facts necessary to support his claim of standing. *Lujan II*, 112 S. Ct. at 2137.

The Third Circuit's standing requirements for Clean Water Act cases -- enunciated in *Powell Duffryn* and followed by the district court in this case -- are in clear conflict with the standing requirements set forth in *Lujan I* and *Lujan II*. The Third Circuit's standard is most deficient with respect to the requirement that the alleged injury be "fairly traceable" to the challenged action; the standard simply abandons all necessity of demonstrating that it was the *defendant's* permit violation (as opposed to someone else's similar effluent discharge, or to the defendant's *permissible* effluent discharge) that caused the injury. *Powell Duffryn* held that the "fairly traceable" requirement is met by demonstrating that a defendant has:

> 1) discharged some pollutant in concentrations greater than allowed by permit 2) into a waterway in which the plaintiffs have an interest that is *or may be* adversely affected by the pollutant and that 3) this pollutant causes or contributes to *the kinds of injuries* alleged by the plaintiffs.

Powell Duffryn, 913 F.2d at 72 (emphasis added). While the Third Circuit was undoubtedly correct in stating that "[a] plaintiff need not prove causation with absolute scientific rigor" in order to establish standing (*id.*), its holding that a plaintiff need show only that his interests "may" be adversely affected by the permit violation and that the violation contributes to the "kind" of injuries alleged by the plaintiff is in clear conflict with *Lujan II's* requirement of a "factual showing of perceptible harm." *Lujan II* at 2139.

The Third Circuit's unwillingness to adhere to strict causation requirements for standing in Clean Water Act cases appears to have been based on a realization of how difficult it is for a plaintiff to trace his alleged injury to a particular permit violation. Indeed, Judge Aldisert's concurring opinion in *Powell Duffryn* is quite candid in admitting that he was willing to find standing -- despite the inability of any plaintiff to trace his injury to the defendant's permit violations -- because of his belief that

the defendant was an unscrupulous actor who would escape unpunished in the absence of a finding of standing. *Powell Duffryn*, 913 F.2d at 83-89 (Aldisert, J., concurring). But *Lujan I* and *II* make clear that facts necessary to establish standing are never to be assumed, and they categorically reject Judge Aldisert's suggestion (*see Powell Duffryn* at 89) that "precepts of standing are perhaps expanded a bit when at stake are the great public policy considerations of insults to the environment."

Standing requirements were relaxed even more in this case than they were in *Powell Duffryn*. Even though Respondents were seeking summary judgment in *their* favor (and thus all disputed issues of material fact were to be resolved against them), the district court rejected out of hand MEI's claims that its permit violation caused no injury (Pet. App. A13) and even appeared to permit Respondents to meet "redressability" requirements based on mere *allegations* (Pet. App. A15) that they were injured by MEI's permit violations.[3]

Furthermore, the Third Circuit's overly liberal standing requirements in Clean Water Act cases cannot be dismissed as an aberration unlikely to be repeated elsewhere, and thus unworthy of the Court's attention. To the contrary, at least two other courts of appeals, the Fourth Circuit and the Fifth Circuit, have explicitly adopted *Powell Duffryn*'s faulty standards for establishing that injury is "fairly traceable" to the challenged conduct. *See Natural Resources Defense Council, Inc. v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992); *Save Our Community v. U.S. Environmental Protection Agency*, 971 F.2d 1155, 1161 (5th Cir. 1992).

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[3] The district court's finding of standing to contest MEI's violation of its monitoring and reporting duties is similarly in conflict with *Lujan II*. *Lujan II* made clear that a "procedural injury" (of the type asserted by Respondents as a result of MEI's violation of monitoring and reporting duties) generally does not constitute "injury-in-fact" sufficient to meet standing requirements. *Lujan II*, 112 S. Ct. at 2142-2146.

In sum, review of the decision below is warranted because that decision is in clear conflict with this Court's *Lujan I* and *II* decisions.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully submits that the Petition should be granted.

Respectfully submitted,

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
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FOUNDATION
1705 N Street, NW
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